COURT OF APPEALS
DECISION
DATED AND FILED

June 30, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2003AP1534 **Cir. Ct. No. 2002CV113**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

ROYSTER-CLARK, INC.,

PLAINTIFF-APPELLANT,

V.

OLSEN'S MILL, INC.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Waushara County: LEWIS MURACH, Judge. *Reversed and cause remanded with directions.*

Before Dykman, Lundsten and Higginbotham, JJ.

¶1 HIGGINBOTHAM, J. Royster-Clark, Inc. appeals a judgment entered, following a court trial, in favor of Olsen's Mill, Inc. in the amount of $28,721.69. The central issue in this appeal is whether there is a sufficient factual

basis to support the conclusion that Royster orally agreed to modify the nitrogen contract. We conclude there was no evidence of such an agreement. We thus further conclude Olsen's Mill is not entitled to any credit against the prepaid nitrogen contract. We therefore reverse and remand this matter to the trial court for an order dismissing Olsen's Mill's counterclaim.[1] Furthermore, because the trial court based its denial of Royster's interest claim on the mistaken view that Olsen's Mill was entitled to a credit on the nitrogen contract, we remand for the trial court to reconsider its decision on the interest claim.

FACTS

¶2 Olsen's Mill entered into two contracts with Royster. The first contract was a written contract, dated January 21, 2001, for Olsen's Mill to purchase 2000 tons of 32% nitrogen fertilizer from Royster at $192 per ton. This product is used to fertilize crops, principally corn, and is applied at the time of planting, which occurs prior to July 1 of each year. The $384,000 contract was prepaid and the sale was free on board (FOB).[2] The contract was made subject to

[1] Royster also seeks costs, attorney fees and interest on the nitrogen contract based on the terms of the credit application executed by Olsen's Mill. The trial court should also address whether Royster is entitled to recover these damages and what amount, if any.

[2] FOB is a delivery term requiring a seller (here Royster) to ship goods to a designated point and bear the expense and risk of putting them into the possession of the carrier. *See* WIS. STAT. § 402.319(1)(a) (2003-04). Apparently, neither party vigorously enforced this particular term of the contract; as it appears, Olsen's Mill agreed to pick up the nitrogen fertilizer at one of Royster's facilities.

All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

the provisions of the Uniform Commercial Code and contained language prohibiting any oral modifications of the contract.[3]

¶3 The second contract was a verbal contract for the purchase of another fertilizer product, Super Rainbow, used for potato crops. Olsen's Mill had special ordered the Super Rainbow product, exhausted its supply and purchased more fertilizer.

¶4 Nitrogen fertilizer was in short supply as the 2001 crop year began. Royster parceled out the scarce nitrogen product to all its customers. However, market conditions dramatically changed as a result of the weather. Starting April 28, 2001, a month of continuing and excessive rain interrupted agricultural activity and many farmers decided not to plant their crops. Demand for fertilizer diminished; prices plummeted. Paul Olsen, an officer of Olsen's Mill, sought a rebate or credit for the remaining prepaid 1300 tons of nitrogen fertilizer based upon the current market price. Other Royster customers were canceling their contracts. Royster's sales agent, Roger Ralston, and Olsen discussed the possibility of obtaining credit against future fertilizer purchases. Ralston

[3] The nitrogen contract states:

> 3. INTERPRETATION—Except to the extent inconsistent with the expressed terms of this contract, this contract shall be governed by and interpreted pursuant to the provisions of the Uniform Commercial Code as enacted in the State of Illinois, USA, and embodies the entire agreement between seller and buyer relative to the sale and purchase of the goods described herein. No additional or different terms shall be binding on seller unless specifically accepted by seller in writing.

Despite this unambiguous provision, both parties stipulate we should apply the UCC as interpreted by Wisconsin law. However, due to the paucity of Wisconsin law addressing the UCC, we look to other jurisdictions for guidance in interpreting the UCC.

presented the proposal to Royster. Olsen later spoke directly with a Royster executive, Robert Rainey. The content and the effect of these discussions are disputed by both Olsen's Mill and Royster and serve as the core of the disputes in this appeal.

¶5 Royster sued Olsen's Mill, seeking to collect the outstanding balance on 34.6 tons of nitrogen fertilizer and for money owed for the Super Rainbow fertilizer. Royster also alleged unjust enrichment.[4] Olsen's Mill counterclaimed, alleging an overpayment on the original nitrogen contract.[5]

¶6 At trial, the parties stipulated to and settled certain issues. The parties agreed Olsen's Mill would reimburse Royster for 34.6 extra tons of fertilizer at $110 per ton for a total of $3,806. In addition, the parties agreed Olsen's Mill owed a total of $50,472.31 on the Super Rainbow contract. Thus, the remaining issues were Olsen's Mill's counterclaim alleging the nitrogen contract had been orally modified entitling Olsen's Mill to a refund and Royster's claim for interest owed on the Super Rainbow contract.

¶7 The trial court concluded the nitrogen contract had been orally modified and that Olsen's Mill was entitled to a rebate of $83,000 on the 1300 tons of the nitrogen fertilizer. The trial court offset the $54,278.31 Olsen's Mill stipulated it owed Royster against the $83,000 it concluded Royster owed Olsen's

[4] While Royster alleged unjust enrichment, this cause of action was not presented at trial and in fact was never further addressed before the trial court. We therefore conclude Royster has abandoned its claim of unjust enrichment.

[5] Olsen's Mill counterclaimed for breach of contract, alleging Royster somehow prevented Olsen's Mill from receiving the nitrogen fertilizer by June 30, 2001. However, the trial court did not address this claim and we decline to do so as well.

Mill and awarded judgment to Olsen's Mill in the amount of $28,721.69. The trial court concluded Royster was not entitled to interest on the Rainbow contract. Royster appeals.

DISCUSSION

¶8 This is a breach of contract action. The only issues relate to Olsen's Mill's counterclaim for an offset against the nitrogen contract award and Royster's interest claim on the Super Rainbow contract. We first address Olsen's Mill's counterclaim.

¶9 The trial court found that as a result of discussions between Ralston and Olsen on June 10, 2001, the nitrogen contract was orally modified. Consequently, the trial court found Olsen's Mill was entitled to a credit on the remaining 1,300 tons of nitrogen fertilizer eventually picked up by Olsen's Mill. On appeal, Royster contends the trial court erred by finding the nitrogen contract was orally modified, asserting that the contract could only be modified in writing and that Ralston never entered into an oral agreement with Olsen to modify the contract. Olsen's Mill counters that the record supports the trial court's findings that the nitrogen contract was orally modified. We agree with Royster that there is no evidence in the record demonstrating Ralston and Olsen reached an oral agreement to modify the nitrogen contract. We conclude that, at most, there was a promise by Ralston to seek a modification of the nitrogen contract. We turn to the law on modification of contracts under Wisconsin's Uniform Commercial Code to provide a context for our discussion.

WISCONSIN STAT. §§ 402.201(1) and 402.209

¶10 The Uniform Commercial Code on Sales is codified in Wisconsin at WIS. STAT. ch. 402. *See* ***Selzer v. Brunsell Bros., Ltd.***, 2002 WI App 232, ¶16, 257 Wis. 2d 809, 652 N.W.2d 806. WISCONSIN STAT. § 402.201(1) provides that transactions for the sale of goods of $500 or more require a writing sufficient to indicate that a contract for sale has been made. Because the nitrogen contract involved a contract for a sale of goods for $500 or more, § 402.201(1) applies.

¶11 WISCONSIN STAT. § 402.209[6] governs modification and rescission of contracts. Section 402.209(2) mandates that a "signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded." Viewed in isolation, this section would prohibit Royster

[6] WISCONSIN STAT. § 402.209 states in its entirety:

> (1) An agreement modifying a contract within this chapter needs no consideration to be binding.
>
> (2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.
>
> (3) The requirements of s. 402.201 must be satisfied if the contract as modified is within its provisions.
>
> (4) Although an attempt at modification or rescission does not satisfy the requirements of sub. (2) or (3) it can operate as a waiver.
>
> (5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

and Olsen's Mill from orally modifying the nitrogen contract because the nitrogen contract expressly provides "[n]o additional or different terms shall be binding on seller unless specifically accepted by seller in writing." *See also* ***American Suzuki Motor Corp. v. Bill Kummer, Inc.***, 65 F.3d 1381, 1386 (7th Cir. 1995).

¶12 However, WIS. STAT. § 402.209(4) is an exception to the writing requirement. Section 402.209(4) provides "[a]lthough an attempt at modification or rescission does not satisfy the requirements" of § 402.209(2) and (3) that contractual modifications be in writing, an attempt at modification can nevertheless "operate as a waiver" of that writing requirement. The term "attempt at modification" has the potential to mislead in this context. One might construe this phrase to mean that a mere effort to modify a contract is an "attempt at modification." However, we believe the better construction of the phrase "attempt at modification" is that it contemplates a completed oral modification of a written contract which prohibits oral modification. In other words, because § 402.209(2) requires contract modifications be in writing, a completed oral agreement to modify a written contract is viewed as an "attempt" to modify the contract; the statutes uses the word "attempt" only in the sense that an oral agreement to modify may or may not be recognized as a binding modification.

¶13 With these principles in mind, we determine whether Royster orally agreed with Olsen's Mill to modify the nitrogen contract. We conclude there is no evidence of such an agreement. Thus, we need not examine WIS. STAT. § 402.209 further.

Insufficient Facts To Establish Waiver

¶14 A trial court's findings of fact will be upheld unless they are clearly erroneous. WIS. STAT. § 805.17(2). We do not reject a trial court's factual finding

merely because there is evidence in the record to support a contrary finding. *See* ***Noll v. Dimiceli's, Inc***., 115 Wis. 2d 641, 643-44, 340 N.W.2d 575 (Ct. App. 1983). A trial court's factual findings are clearly erroneous when no evidence in the record supports the finding. *See* ***State v. Santiago***, 206 Wis. 2d 3, 26-27, 556 N.W.2d 687 (1996).

¶15 The trial court found the written nitrogen contract was orally modified the second week of June 2001 when Paul Olsen agreed to take the balance of nitrogen fertilizer in return for either offsetting credit or free future product. The trial court noted Olsen and Ralston both testified they discussed Royster giving Olsen's Mill a deal on the price similar to that offered other buyers. The trial court specifically found Ralston had apparent authority to bind Royster to the orally modified contract. The trial court further observed it was not until later that it became apparent Ralston lacked the authority to modify the contract when Rainey repudiated the deal. The trial court ultimately concluded "that Olsen reasonably believed the promised consideration would be forthcoming if Olsen carried out its part of the bargain."

¶16 We conclude the trial court's findings are clearly erroneous. Olsen's Mill contends the oral modification was completed by the oral agreement made by Ralston and Olsen for price concessions on the nitrogen contract and as evidenced by Olsen's Mill's actions in picking up the remainder of the prepaid nitrogen fertilizer. The record does not support Olsen's Mill's position or the trial court's conclusion that the contract was modified. Indeed, the record does not support the conclusion that Ralston and Olsen even reached an oral agreement to modify the contract. At most, the record shows that Ralston, Royster's agent, promised Olsen he would try to obtain concessions from Royster if Olsen's Mill picked up the remaining fertilizer.

¶17 At trial, Olsen conceded he purchased 2000 tons of nitrogen fertilizer, which was prepaid in January 2001.[7] He also testified it was industry practice, and his practice with Royster, that companies under the inventory protection program[8] usually were afforded a credit on inventory not used if the market prices dropped.[9] Olsen further testified that as the nitrogen fertilizer market prices plummeted, he approached Ralston for a price concession or to "buy out" or cancel the contract. On this point Olsen testified

> We asked if there was going to be concession or we could buy out of the contract or cancel a contract, and Roger virtually pleaded with us, as he's testified, [w]e have the money; we have the product. He wanted us to make sure we took the product and we had some negotiation, talking, and at that time it was still raining and we made -- I should say I believe I had agreement with Roger -- we put three of our bins of trucks on and hauled product from East Dubuque, and he was going to inform us if the price went down. My commitment to him was I would take and move that product to the farmer and personally at this time it was going to simply be going out on ground through your agent's systems, and whatever price it was from what we purchased it to what we sold it to the farmer, was what he was going to try to get a credit when we refilled in the fall of either material or price concession on the number of times we bought.
>
> ….

[7] We review only Paul Olsen's testimony to determine whether there was an oral agreement to modify the nitrogen contract because the trial court found Olsen to be the more credible witness at trial.

[8] Paul Olsen testified that industry customers such as Olsen's Mill are permitted under this program to only pay for what they sold; the remaining product is inventoried and the customer is then re-billed at the current market price for that product.

[9] Although Olsen testified this was an industry practice, Olsen did not explain how this practice allowed Olsen's Mill to simply back out of its obligation under the contract and still receive concessions from Royster.

> He was going to work to either give us free product or reduce the price per ton of product we would have purchased in our fall fill. We typically buy about 6000 ton of 32 percent nitrogen in September-October to fill for the following year.

When Olsen was cross-examined, this exchange occurred:

> Q: ... Mr. Ralston told you he wanted to give you a rebate but he couldn't; is that correct?
>
> A: Mr. Ralston said he was going to work on the rebate and try to get it accomplished.

¶18 On re-cross-examination, Olsen once again testified Ralston promised he would attempt to "work something out with regard to the nitrogen product ...." Olsen also conceded Ralston never discussed with him the specific terms of the rebate or refund, but only said he would explore a few options.

¶19 Thus, Olsen himself testified that although he believed he had an agreement with Royster based on his discussions with Ralston, the evidence establishes only that Ralston promised Olsen he would explore other options. Ralston testified he said that he did not have the authority to enter into a new agreement with Olsen's Mill. Olsen did not dispute this testimony. According to Olsen, Ralston was to "inform us if the price [of the nitrogen fertilizer] went down." There is no evidence Ralston ever recontacted Olsen to seal the deal. The record shows the next time Ralston and Olsen communicated was when Ralston called Rainey in July scheduling the meeting between Olsen and Rainey to discuss the situation. Therein lies the fatal flaw to Olsen's Mill's claim that Olsen and Ralston actually orally agreed to modify the contract. As we discussed earlier, a contract subject to the requirement that all modifications be in writing may be orally modified only if it can be shown that the parties to the contract "attempted" to modify the written agreement. WIS. STAT. § 402.209(4). We have explained

the meaning of "attempt" in this context means an actual agreement. It follows from this rule that the first step on the road to an orally modified contract in this case is that the parties orally agree to modify. The evidence of record does not demonstrate Ralston and Olsen made this first step. Accordingly, we conclude the record lacks necessary evidence that Royster and Olsen's Mill orally agreed on anything.

Royster's Interest Claim on the Super Rainbow Product

¶20 The trial court rejected Royster's claim for interest, acting on what we have concluded is an erroneous premise that Olsen's Mill was entitled to a credit on the nitrogen contract. Since we reverse the trial court in that regard, we conclude, as we explain below that the trial court must address the interest issue.

¶21 Royster argues Olsen's Mill was contractually obligated to pay interest on the outstanding balances under the Super Rainbow contract based on the terms of a credit application executed by Olsen's Mill; the purpose of the application was to obtain credit for the purchase of the Super Rainbow fertilizer.[10] The credit application provided a late payment penalty of 18% interest and costs of collection and attorney fees. Royster claims it sent invoices[11] to Olsen's Mill demanding payment within fifteen days of receipt thereof.

¶22 Olsen's Mill does not dispute the following: (1) an agent for Olsen's Mill executed the credit application; (2) it purchased the product at a price of

[10] Royster also seeks attorney fees and costs pursuant to the Super Rainbow contract.

[11] Royster sent Olsen's Mill eleven invoices dated from May 18, 2001 to May 26, 2001.

$50,472.31 and; (3) it had not paid for the Super Rainbow product at the time of trial.

¶23 The central issue is when was Olsen's Mill required to pay for the fertilizer. Olsen's Mill contends Ralston and Olsen's Mill agreed Olsen's Mill would purchase the product at the contract price, use what it could, then store the balance for Royster. According to Olsen's Mill, as part of the agreement, Ralston would determine what Olsen's Mill sold at the end of the year and pay for that product at the contract price. Olsen's Mill further contends that when the Super Rainbow product sold the following year, Royster would charge Olsen's Mill the current market price or the contract price, whichever was lower.

¶24 Royster argues no such agreement existed. Royster claims no one at Royster, except for Ralston, was aware of the new agreement. Royster further argues that even if the new agreement were enforceable, interest would begin accruing in January 2002 because Olsen's Mill had already sold the product.

¶25 The trial court concluded Olsen's Mill owed Royster $50,472.31 on the Super Rainbow contract—a fact the parties stipulated to at the beginning of the trial. The trial court also concluded Royster was not entitled to interest on the amount due as described in the invoice.

¶26 Because we have concluded that the nitrogen contract was not orally modified, the trial court's reason to deny interest no longer is applicable. We remand on this issue to afford the trial court an opportunity to reconsider Royster's claim for interest.

By the Court.—Judgment reversed and cause remanded with directions.

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